A

AISYAH MOHD ROSE & ANOR v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
B [CRIMINAL APPEAL NO: P-09-172-06-2014]
13 NOVEMBER 2015

C ***CRIMINAL PROCEDURE:*** *Charge – Framing or particulars of – Criminal breach of trust – Charge in respect of 27 transactions made at different times involving different amount within period of one year – Whether sufficient to specify gross sum and dates between which offence alleged to have been committed without specifying particular items or exact dates – Whether specific provision of s. 153(2) prevails over general provision of s. 164 of Criminal Procedure Code – Whether charge valid*

D ***CRIMINAL PROCEDURE:*** *Charge – Framing or particulars of – Criminal breach of trust – Whether there were distinct offences warranting separate charges – Whether error in charge – Whether accused persons misled by error in particulars of charge – Whether failure to state manner of abetment rendered charge defective – Criminal Procedure Code, ss. 156 & 163*

E ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Charges under s. 409 of Penal Code and s. 4(1) of Anti-Money Laundering and Anti-Terrorism Financing Act 2001 – Whether offences proven – Whether convictions safe – Whether sentences appropriate*

F ***CRIMINAL PROCEDURE:*** *Sentence – Appeal – Maximum sentence – Whether should be reserved and only warranted in 'worst case imaginable' scenario – Whether trial judge considered mitigation and given justification for imposition of maximum sentence – Whether appellate interference warranted*

G ***CRIMINAL LAW:*** *Penal Code – Section 409 – Criminal breach of trust – Ingredients of offence – Whether actual wrongful loss or gain an ingredient to be proved – Whether clear case of dishonest misappropriation and conversion of cheques – Penal Code, s. 24*

H ***CRIMINAL LAW:*** *Anti-Money Laundering and Anti-Terrorism Financing Act 2001 – Section 4(1) – Definition of money laundering – Whether includes acts of engaging directly or indirectly, in a transaction that involves proceeds of an unlawful activity – Whether unlawful activity related to any serious offence or any foreign serious offence – Whether offence under s. 409 of Penal Code listed as serious offence – Whether predicate offence of criminal breach of trust under s. 409 proven – Whether convictions safe*

I ***WORDS & PHRASES:*** *'in any manner entrusted' – Section 409 Penal Code – Meaning and import*

The first appellant was the Head of Customer Service of Bank Muamalat Bhd, USM, Penang ('the bank') whilst, the second appellant, her husband, was formerly an advocate and solicitor and was a partner in a legal firm, Messrs Johari, Nasri & Tan ('the firm'). Four companies had instructed their respective banks to issue banker's cheques ('the cheques'). The cheques were general crossing cheques. The payee of the cheques was the State Director of Customs, Penang and the purpose of the cheques was for payment of customs duties. The cheques were collected from the respective banks by the intermediaries who had been authorised by the companies to make payment to the customs. However, the intermediaries did not take the said cheques directly to the counter of the customs revenue collection unit for payment of customs duties but had handed the cheques to the second appellant who then passed the cheques to the first appellant. The customs had no account with the bank and the rules and regulations of the bank did not allow crossed cheques to be processed and credited into a third party account. Instead of returning the cheques to the bearers and contrary to rules and regulations of the bank, the first appellant approved the process for the cheques' clearance and eventually credited the cheques into the second appellant's client account, the third party. The second appellant thereafter withdrew the money from the client's account. An internal audit of the bank revealed an act of misappropriation in respect of the cheques which led to a police report being lodged and subsequently, to the charges being preferred against the appellants in the Sessions Court, *inter alia*, under s. 409 of the Penal Code and s. 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA'). The Sessions Court Judge found that the prosecution had proved its case against the appellants beyond reasonable doubt. They were each sentenced to ten years imprisonment for the first charge and to five years imprisonment for the second charge and the sentences were ordered to run concurrently. Their appeal to the High Court against the convictions and sentences were dismissed. Hence, this appeal. The issues raised by the appellants were: (i) the first charge was defective, illegal and in breach of s. 163 of the Criminal Procedure Code ('CPC') and the charge of abetment against the second appellant was also defective for failure to particularise the manner of abetment; (ii) there was no evidence of entrustment; and (iii) there was no loss suffered by any parties.

Held (dismissing appeal against convictions; allowing appeal against sentences)

Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) Although the first charge against the appellants was in respect of 27 transactions and that each and every transaction was made at a different time involving different amounts, they were transacted within the period of one year. Section 153(2) of the CPC is a specific provision in relation to the offence of criminal breach of trust which stipulates that for an offence of a criminal breach of trust, it shall be sufficient to

A specify the gross sum and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates. The section prevailed over the general provision in s. 164 of the CPC, which was relied on by the appellants, and in that light, the first charge against the appellants was properly framed and was valid. In the B circumstances, the first issue was devoid of any merit. (paras 24-26)

(2) Section 163 of the CPC stipulates that for every distinct offence, there shall be a separate charge. In the instant appeal, there were no distinct offences but only the offence of criminal breach of trust. Hence, there was no violation of s. 163 of the CPC as such, except that if at all there C was an error, it was for combining the two particulars of the offence in the charge, when the particulars ought to have been either 'entrusted with the property' or having 'dominion over the property'. However, based on s. 156 of the CPC, what is of significance is not the error *per se* in the charge but whether the error had resulted in the appellants D being misled. On the facts, the appellants had not been misled or prejudiced by the error in the particulars of the charge such that they were not able to put up a proper defence. (paras 28 & 30)

(3) While the charge against the second appellant did not state the manner of abetment, following the decision in *Chin Chan Leong v. PP & Anor*, E the charge was not defective. There was also nothing in the records of appeal which suggested that the second appellant was confused by the lack of particulars of abetment. Based on the records of appeal, it was clear that the defence of the second appellant, that the acts were done pursuant to his client's instructions, was not in any way hindered by the F absence of the manner of abetment. (paras 33 & 34)

(4) To bring home the charge of criminal breach of trust, the prosecution must prove that the first appellant was entrusted with the cheques or that the first appellant had dominion over the cheques. The gist of the offence is that there is dishonest misappropriation or conversion to one's own G use or that there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged. Although the first appellant was not entrusted directly with the cheques by the companies, it could not be denied that through the intermediaries, the cheques ended up with the second appellant and from the second H appellant, to the first appellant. 'In any manner entrusted' is wide enough to encompass not only the property being directly entrusted by the owner to the accused but also property entrusted by the owner to the accused indirectly, as in the instant appeal, entrusted to the first appellant by virtue of her position as an agent of the bank. The first I appellant clearly had dominion over the cheques. (paras 35, 37 & 42)

(5) Under s. 24 of the Penal Code, actual wrongful loss or gain is not an ingredient to be proved for the offence of criminal breach of trust. It was thus immaterial that no one suffered any loss as a consequence of the acts

of the appellants. Further, the first appellant, by crediting the cheques into the second appellant's client account, had misappropriated the cheques. The first appellant could not be said to have acted in good faith. She had without doubt, caused wrongful gain to the second appellant. Hence, this was not a case of negligence or carelessness but a clear case of dishonest misappropriation and conversion of the cheques. (paras 45, 46 & 49)

(6) Section 4(1) of the AMLATFA provides that any person who engages in or attempts to engage in money laundering commits an offence. Money laundering as defined in s. 3(1) of the AMLATFA is the act of a person who engages directly or indirectly, in a transaction that involves proceeds of an unlawful activity. Unlawful activity is any activity which is related, directly or indirectly to any serious offence or any foreign serious offence. Under the Second Schedule of the AMLATFA, the offence under s. 409 of the Penal Code has been listed as a serious offence. Pursuant to s. 4(2) of the AMLATFA, the conviction for an offence under s. 4(1) can be sustained even without the conviction for a predicate offence. The predicate offence of criminal breach of trust under s. 409 of the Penal Code had been proven. The convictions of the first and the second appellants for the first charge were safe and it followed that the offence for the second charge under AMLATFA was also safe. (paras 50-52)

(7) The maximum sentence should be reserved and is only warranted in a 'worst case imaginable' scenario. However, there was nothing on record to show why or how this case could be categorised as the 'worst case imaginable' scenario. On the basis that the learned Sessions Judge had completely disregarded the mitigation of the appellants and had not given any justification for the imposition of the maximum sentence, this was a suitable case for appellate intervention on sentence. Therefore, the appeal on sentence was allowed. The sentence imposed by the Sessions Judge was set aside and substituted with a sentence of imprisonment for five years and three years for the first charge and the second charge respectively on each appellant, with the sentences to run concurrently. (paras 58 & 59)

Bahasa Malaysia *Headnotes*

Perayu pertama ialah Ketua Perkhidmatan Pelanggan Bank Muamalat Bhd, USM, Pulau Pinang ('bank') manakala, perayu kedua, suaminya, ialah bekas peguambela dan peguamcara dan rakan kongsi firma guaman Tetuan Johari, Nasri & Tan ('firma tersebut'). Empat buah syarikat telah mengarahkan bank-bank mereka mengeluarkan cek jurubank ('cek-cek tersebut'). Cek-cek tersebut ialah cek-cek berpalang biasa. Penerima cek-cek tersebut ialah Pengarah Kastam Negeri, Pulau Pinang dan tujuan cek-cek tersebut adalah sebagai bayaran duti kastam. Cek-cek tersebut telah diambil daripada bank masing-masing oleh pengantara yang diberi kuasa oleh syarikat-syarikat

A tersebut untuk membuat bayaran kepada pihak kastam. Walau bagaimanapun, pengantara tidak melanjutkan cek-cek tersebut terus ke kaunter unit pemungutan hasil kastam untuk bayaran duti kastam, tetapi memberikan cek-cek tersebut kepada perayu kedua yang selanjutnya memberikan cek-cek tersebut kepada perayu pertama. Pihak kastam tidak
B mempunyai akaun dengan bank tersebut dan kaedah-kaedah serta peraturan bank tidak membenarkan cek berpalang diproses dan dikreditkan ke dalam akaun pihak ketiga. Bertentangan dengan kaedah-kaedah dan peraturan bank, perayu pertama gagal mengembalikan cek-cek tersebut kepada pembawa tetapi telah meluluskan pemprosesan penjelasan cek-cek tersebut dan
C kemudian telah memasukkan cek-cek tersebut ke dalam akaun anak guam perayu kedua, iaitu pihak ketiga. Selepas itu, perayu kedua mengeluarkan wang tersebut daripada akaun anak guam tersebut. Audit dalaman bank mendedahkan tindakan penggelapan berkaitan cek-cek tersebut yang membawa kepada laporan polis dan pertuduhan-pertuduhan terhadap
D perayu-perayu di Mahkamah Sesyen, antara lain, di bawah s. 409 Kanun Keseksaan dan s. 4(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('Akta'). Hakim Mahkamah Sesyen mendapati pihak pendakwaan berjaya membuktikan kesnya terhadap perayu-perayu melampaui keraguan munasabah. Masing-masing dijatuhkan hukuman sepuluh tahun penjara bagi pertuduhan pertama dan lima tahun
E penjara bagi pertuduhan kedua dan hukuman diarahkan berjalan serentak. Rayuan mereka ke Mahkamah Tinggi terhadap sabitan dan hukuman ditolak. Dengan itu, rayuan ini. Isu-isu yang dibangkitkan oleh perayu-perayu adalah: (i) pertuduhan pertama adalah cacat, tidak sah dan melanggar s. 163 Kanun Tatacara Jenayah ('KTJ') dan pertuduhan persubahatan terhadap perayu
F kedua juga cacat atas kegagalan menentukan butir-butir cara persubahatan; (ii) tiada keterangan bagi pengamanahan; (iii) tiada kerugian yang dialami oleh mana-mana pihak.

Diputuskan (menolak rayuan terhadap sabitan; membenarkan rayuan terhadap hukuman)

G **Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:**

(1) Walaupun pertuduhan pertama terhadap perayu-perayu berkait dengan 27 transaksi dan setiap satu transaksi dibuat pada waktu berbeza melibatkan jumlah yang berlainan, ia dibuat dalam tempoh satu tahun.
H Seksyen 153(2) KTJ adalah peruntukan spesifik berkaitan kesalahan pecah amanah yang menyebut bahawa bagi kesalahan jenayah pecah amanah, adalah mencukupi untuk menyatakan jumlah kasar dan tarikh antara mana kesalahan tersebut didakwa telah dilakukan tanpa menyatakan butiran secara terperinci atau tarikh yang sebenar. Seksyen
I tersebut mengatasi peruntukan am s. 164 KTJ, yang disandarkan oleh perayu-perayu, dan dengan itu, pertuduhan pertama terhadap perayu-perayu telah dibuat dengan sewajarnya dan sah. Dalam keadaan itu, isu pertama tidak bermerit.

(2) Seksyen 163 KTJ memperuntukkan bahawa bagi setiap kesalahan yang berbeza, pertuduhan berasingan perlu dibuat. Dalam rayuan ini, tiada kesalahan berbeza tetapi hanya kesalahan pecah amanah. Oleh itu, tiada pelanggaran s. 163 KTJ, kecuali jika ada kesilapan, ia adalah kerana mencantumkan dua butiran bagi kesalahan dalam pertuduhan, bila mana butiran tersebut sepatutnya adalah sama ada 'diamanahkan dengan harta' atau mempunyai 'penguasaan terhadap harta'. Walau bagaimanapun, berdasarkan s. 156 KTJ, apa yang penting bukan kesilapan dalam pertuduhan tetapi sama ada kesilapan tersebut menyebabkan perayu-perayu tersalah arah. Atas fakta, perayu-perayu tidak tersalah arah atau diprejudis oleh kesilapan dalam butiran pertuduhan menyebabkan mereka tidak boleh membela diri dengan sewajarnya.

(3) Walaupun pertuduhan terhadap perayu kedua tidak menyatakan cara persubahatan, mengikut keputusan kes *Chin Chan Leong v. PP & Anor*, pertuduhan tersebut tidak cacat. Malahan, tiada apa-apa dalam rekod rayuan yang mencadangkan bahawa perayu kedua telah terkeliru dengan kekurangan butiran tentang persubahatan. Berdasarkan rekod rayuan, jelas bahawa pembelaan perayu kedua, bahawa tindakan-tindakan tersebut dilakukan menurut arahan anak guamnya, tidak dalam apa cara sekalipun terhalang dengan ketiadaan butiran persubahatan.

(4) Bagi pihak pendakwaan membuktikan pertuduhan pecah amanah jenayah, pihak pendakwaan perlu membuktikan bahawa perayu pertama diamanahkan dengan cek-cek tersebut atau perayu pertama mempunyai penguasaan terhadap cek-cek tersebut. Intipati kesalahan adalah terdapatnya pelesapan secara salah atau penukaran kepada penggunaan seseorang atau terdapat pengguna tidak jujur bertentangan dengan arahan, langsung atau tersirat, berkaitan dengan cara di mana amanah tersebut perlu dilaksanakan. Walaupun perayu pertama tidak diamanahkan secara langsung dengan cek-cek tersebut oleh syarikat-syarikat itu, tidak dinafikan bahawa melalui pengantara, cek-cek tersebut akhirnya ke tangan perayu kedua dan daripada perayu kedua, kepada perayu pertama. 'Dalam apa-apa cara yang diamanahkan' adalah luas untuk merangkumi bukan sahaja harta yang diamanahkan secara langsung oleh pemilk kepada tertuduh, malahan harta yang diamanahkan oleh pemilik kepada tertuduh secara tidak langsung, seperti dalam rayuan ini, diamanahkan kepada perayu pertama melalui kedudukannya sebagai ejen bank. Perayu pertama jelas mempunyai penguasaan terhadap cek-cek tersebut.

(5) Di bawah s. 24 Kanun Keseksaan, kerugian atau keuntungan secara salah yang sebenar bukan unsur yang perlu dibuktikan bagi kesalahan pecah amanah jenayah. Oleh itu, tidak penting bahawa tiada siapa pun yang mengalami kerugian akibat tindakan perayu-perayu. Selanjutnya, perayu pertama, dengan mengkreditkan cek-cek tersebut ke dalam akaun anak guam perayu kedua, telah menggelapkan cek-cek tersebut. Perayu

pertama tidak boleh dikatakan telah bertindak dengan jujur. Dia telah, tanpa ragu-ragu, menyebabkan keuntungan secara salah kepada perayu kedua. Oleh itu, ini bukan kes kecuaian atau kelalaian tetapi jelas kes penggelapan dan pengubahan tidak jujur cek-cek tersebut.

(6) Seksyen 4(1) Akta memperuntukkan bahawa sesiapa yang terlibat atau mencuba untuk melibatkan diri dalam pengubahan wang melakukan kesalahan. Pengubahan wang seperti yang ditafsirkan dalam s. 3(1) Akta adalah tindakan seseorang yang terlibat secara langsung atau tidak langsung, dalam transaksi yang melibatkan hasil aktiviti haram. Aktiviti haram adalah apa-apa aktiviti yang berkait, secara langsung atau tidak langsung dengan apa-apa kesalahan serius atau apa-apa kesalahan serius asing. Di bawah Jadual Kedua Akta, kesalahan di bawah s. 409 Kanun Keseksaan disenaraikan sebagai kesalahan serius. Menurut s. 4(2) Akta, sabitan bagi kesalahan di bawah s. 4(1) boleh dikekalkan walaupun sabitan tersebut adalah bagi kesalahan predikat. Kesalahan predikat pecah amanah jenayah di bawah s. 409 Kanun Keseksaan telah dibuktikan. Sabitan-sabitan perayu pertama dan kedua bagi pertuduhan pertama adalah selamat dan berikutan itu kesalahan bagi pertuduhan kedua di bawah Akta juga selamat.

(7) Hukuman maksimum sepatutnya diperuntukkan dan hanya wajar dalam keadaan 'kes yang paling teruk'. Walau bagaimanapun, tiada apa-apa atas rekod yang menunjukkan mengapa atau bagaimana kes ini boleh dikategorikan sebagai 'kes yang paling teruk'. Atas dasar bahawa Hakim Sesyen telah tidak mengendahkan langsung mitigasi perayu-perayu dan tidak memberikan justifikasi bagi pengenaan hukuman maksimum, ini adalah kes yang sesuai untuk campur tangan rayuan terhadap hukuman. Oleh itu, rayuan terhadap hukuman dibenarkan. Hukuman yang dijatuhkan oleh Hakim Sesyen diketepikan dan digantikan dengan hukuman penjara lima tahun dan tiga tahun masing-masing bagi pertuduhan pertama dan kedua atas setiap perayu, dan hukuman diarahkan berjalan serentak.

Case(s) referred to:

Abinash Chandra Sarkar & Ors v. Emperor [1936] 37 Cr LJ 439 ***(refd)***
Ahmad Zubair Hj Murshid v. PP [2014] 1 CLJ 697 CA ***(refd)***
Bhandulananda Jayathilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Che Hasan Senawi v. PP [2008] 5 CLJ 769 CA ***(refd)***
Chin Chan Leong v. PP & Anor [2010] 3 CLJ 281 CA ***(foll)***
Datuk Hj Harun Hj Idris & Ors v. PP [1977] 1 LNS 24 FC ***(refd)***
Loh Liang Gun & Anor v. PP [2007] 4 CLJ 467 CA ***(refd)***
Mohd Khir Toyo v. PP [2015] 8 CLJ 769 FC ***(refd)***
Pasupathy Kanagasaby v. PP [2005] 1 CLJ 442 CA ***(refd)***
PP v. Lawrance Tan Hui Seng [1993] 4 CLJ 221 SC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
Sanjeev Kumar Veerasingam v. PP & Other Appeals [2015] 4 CLJ 743 CA ***(refd)***
Sathiadas v. PP [1970] 1 LNS 142 HC ***(refd)***

Sim Gek Yong v. PP [1995] SGHC 27 ***(refd)***
Sinnathamby v. PP [1948] 1 LNS 160 ***(refd)***
Som Nath v. State of Rajashtan [1972] AIR SC 1490 ***(foll)***
State of Gujurat v. Jaswantlal Nathalal [1968] SCR 2 408 ***(refd)***

Legislation referred to:
Anti-Money Laundering And Anti-Terrorism Financing Act 2001, ss. 3(1), 4(1), (2)
Bills of Exchange Act 1949, s. 81A
Criminal Procedure Code, ss. 153(2), 156, 163, 164(1), 422
Penal Code, ss. 24, 107, 409

For the appellants - MM Athimulan (Md Yusuf Md Idris & Muhamad Asri Abdul Hamid with him); M/s Yusuf Idris & Co
For the respondent - Allan Suman Pillai (Anselm Charles Fernandis & Musli Ab Hamid with him); DPPs

[Editor's note: For High Court judgment please see Aishah Mohamed Rose & Anor v. PP [2014] 1 LNS 957 (affirmed in part)]

Reported by S Barathi

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] The second and the first appellants are husband and wife. They both faced two charges in the Sessions Court, Penang.

[2] The charges against the first appellant read:

> (i) Bahawa kamu di antara 23 Februari 2009 dan 7 Disember 2009 di Bank Muamalat Bhd, Bangunan D12, Universiti Sains Malaysia, Jalan Minden dalam Daerah Timur Laut di Negeri Pulau Pinang, sebagai seorang agen Bank Muamalat Berhad, iaitu sebagai Ketua Pusat Khidmat Pelanggan Bank Mualamat USM telah diamanahkan dengan penguasaan ke atas harta tertentu, iaitu RM1,578,191.00 dalam perjalanan urusan kamu sebagai Ketua Pusat Khidmat Pelanggan Bank Muamalat USM dan kamu telah melakukan satu pecah amanah jenayah berkenaan dengan harta tersebut dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.
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> (ii) Bahawa kamu pada 7 Disember 2009 di Bank Muamalat Malaysia Bhd, Bangunan D12, Kampung Minden 11800 Minden dalam Daerah Timur Laut di dalam Negeri Pulau Pinang, telah melibatkan diri dalam pengubahan wang haram iaitu mengubah wang berjumlah RM183,702-63 melalui sekeping cek Citibank bernombor 792248 yang bertarikh 1 Disember 2009 yang merupakan hasil dari aktiviti haram di dalam akaun pelanggan Johari, Nasri & Tan dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 4(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

[3] As against the second appellant, the charges were:

(i) Bahawa kamu di antara 23 Februari 2009 dan 7 Disember 2009 di Bank Mualamat, Bhd, Bangunan D12, Universiti Sains Malaysia, Jalan Minden dalam Daerah Timur Laut di Negeri Pulau Pinang, telah bersubahat dengan Aishah bt. Mohamed Rose (No. KP 610422-07-5650) untuk melakukan pecah amanah jenayah berkenaan sesuatu harta tertentu, iaitu RM1,578,191-00 di mana Aishah bt. Mohamed Rose telah diamanahkan dengan penguasaan ke atas harta tersebut dalam perjalanan urusannya sebagai Ketua Pusat Khidmat Pelanggan Bank Muamalat USM, di mana kesalahan pecah amanah tersebut telah dilakukan atas sebab persubahatan kamu dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan dibaca bersama seksyen 109 Kanun Keseksaan yang sama.

(ii) Bahawa kamu pada 7 Disember 2009 di Bank Muamalat Malaysia Bhd, Bangunan D12, Kampung Minden 11800 Minden dalam daerah Timur Laut di dalam Negeri Pulau Pinang, telah melibatkan diri dalam pengubahan wang haram iaitu memiliki wang berjumlah RM183,702-63 yang merupakan hasil dari aktiviti haram di dalam akaun pelanggan Johari, Nasri & Tan dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 4(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

The Background Facts

[4] Briefly, the first appellant was, at the material time the Head of Customer Service of Bank Muamalat Berhad, USM, Penang (the bank). The second appellant was formerly an advocate and solicitor and was a partner in a legal firm, Messrs Johari, Nasri & Tan (the firm). Though he had ceased to practise in 2003, the second appellant was at the material time, still in charge of the administration of the firm including giving directions to lawyers and staffs.

[5] Four companies namely Sanmina SCI Sdn Bhd, DSV Air & Sea Sdn Bhd, GAC Cargo System Sdn Bhd and Apex Pal Sdn Bhd (the companies) had instructed their respective banks to issue banker's cheques (the cheques). The cheques were general crossing cheques. The payee of the cheques was the State Director of Customs, Penang (the customs) and the purpose of the cheques was for payment of customs duties.

[6] The cheques were collected from the respective banks by the intermediaries who had been authorised by the companies to make payment to the customs. The intermediaries did not take the said cheques directly to the counter of the customs revenue collection unit for payment of customs duties but had handed the cheques to the second appellant who then passed the cheques to the first appellant.

[7] The customs had no account with the bank and the rules and regulations of the bank do not allow crossed cheques to be processed and credited into a third party account. In the circumstances, the cheques should be returned to the bearers.

[8] Instead of returning the cheques and contrary to rules and regulations of the bank, the first appellant filled up the bank deposit slips, 'over ride' the cheques, instructed the tellers (SP5 - SP9) to process the cheques and approved the process for the cheques' clearance. The first appellant eventually credited the cheques into the second appellant's client account, the third party. The second appellant thereafter withdrew the money from the client's account.

[9] An internal audit of the bank revealed an act of misappropriation in respect of the cheques which led to a police report being lodged and subsequently, to the charges being preferred against the appellants.

[10] We do not propose to set out the proceedings in and the findings of the Sessions Court, except to state that the appellants denied the charges against them. The first appellant stated in her defence that it was a common practice for crossed cheques to be credited into the account of a third party and that she was merely following the wishes of the client/customer, namely the second appellant, her husband. She maintained that what she did was not contrary to the law or the bank's rules and regulations. As for the second appellant, the defence was similarly premised on client's instructions. It must however be noted that neither the customs nor the four companies were the client of the firm.

[11] The Sessions Court Judge found that the prosecution had proved its case against the appellants beyond reasonable doubt. They were each sentenced to ten years imprisonment for the first charge and to five years imprisonment for the second charge. The sentences were to run concurrently. Their appeal to the High Court against the convictions and sentences were dismissed, hence the appeal to this court.

The Appeal

[12] Before us, learned counsel for the appellants raised the following issues:

(i) that the first charge was defective, illegal and in breach of s. 163 of the Criminal Procedure Code (CPC) and that the charge of abetment against the second appellant was also defective for failure to particularise the manner of abetment.

(ii) that there was no evidence of entrustment; and

(iii) that there was no loss suffered by any parties.

A **Defective/Illegal Charge**

[13] The gross amount of RM1,578,191 stated in the first charge against the appellants was accumulated from 27 transactions. Learned counsel submitted that there should be 27 different charges as each of the transaction was a complete offence in itself.

B

[14] In contending that the first charge was defective and illegal which could not be cured under s. 422 of the CPC and that on this ground alone the appeal ought to be allowed, learned counsel relied on ss. 163 and 164(1) of the CPC which provide:

C

> 163. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170.
>
> 164. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offence, whether in respect of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three.

D

[15] Learned counsel also submitted that the first charge which reads "diamanahkan dengan penguasaan ke atas harta tertentu" was unknown to law as the wording did not reflect the provision of s. 409 which reads:

E

> 409. Whoever, being in any manner entrusted with property, or with any dominion over the property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping and shall also liable to fine.

F

[16] In this regard, the complaint of learned counsel was that under section 409, there are two limbs namely, "entrusted with property" or "dominion over the property" whereas the charge against the appellants had merged the elements of "entrusted" with "dominion over the property".

G

[17] In respect of the charge of abetment against the second appellant, the word stated in the charge was "telah bersubahat" with the first appellant to commit the criminal breach of trust. Relying on the case of *Sanjeev Kumar Veerasingam v. PP & Other Appeals* [2015] 4 CLJ 743 learned counsel contended that the charge was defective as it did not particularise the manner the act of abetment was done, namely whether by way of instigating, conspiring or aiding the doing of the act as provided under s. 107 of the Penal Code.

H

I

Element Of Entrustment

[18] On the second issue, learned counsel submitted that to prove the charge under s. 409 of the Penal Code, the prosecution must prove the element of entrustment and that the existence of entrustment can be in two ways:

(i) by the appellant being entrusted with the property; or

(ii) by the appellant having dominion over the property.

[19] In the present appeal, it was contended that the appellants have never been entrusted with the cheques by the owners as the cheques were passed through 14 intermediaries before they reached the second appellant and subsequently, the first appellant.

[20] There being no evidence of entrustment between the first appellant and the four companies, the owners of the cheques, it was the submission of learned counsel that the trial judge was wrong when she made a finding that entrustment occurred when the first appellant received the cheques.

[21] Citing *State of Gujurat v. Jaswantlal Nathalal* [1968] SCR 2 408 and *PP v. Lawrance Tan Hui Seng* [1993] 4 CLJ 221, learned counsel submitted that entrustment can only be created by the owners of the cheques themselves and not through the intermediaries. And that in order to establish the existence of actual entrustment, the prosecution must prove that there was a fiduciary relationship between the first appellant and the owners of the cheques, which was never proved throughout the case. It was further the submission of learned counsel that even if crediting the cheques into the third party's account was not allowed, it was an entrustment of a job rather than entrustment of the property itself to the first appellant.

No Loss Suffered

[22] On the third issue, learned counsel submitted that the cheques, though had been credited into the third party's account, were subsequently paid to the customs. In view of the payment, the companies received the goods. There was no claim filed by the bank or the customs. It was thus contended that no party had suffered wrongful loss to bring the case within the purview of 'doing an act dishonestly'.

Our Findings

Defective/Illegal Charge

[23] The offences for which the appellants were charged involved 27 transactions of different amounts and different dates. Under s. 164, an accused may be charged with and tried at one trial for a maximum of three offences of the same kind committed within the space of 12 months from the

A first to the last of such offences. To lump all 27 transactions in one charge and one trial, it was contended by learned counsel that the prosecution had breached s. 164 of the CPC.

[24] With respect, we disagree with learned counsel. Although the first charge against the appellants was in respect of 27 transactions and that each B and every transaction was made at a different time involving different amounts, they were transacted within the period of one year, namely from 23 February 2009 until 7 December 2009.

[25] We note that while s. 164 speaks of offences in general, there is a C specific provision in relation to the offence of criminal breach of trust. This is found in s. 153(2) which states as follows:

> When the accused is charged with criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, D without specifying particular items of exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 164:
>
> > Provided that the time included between the first and last of such dates shall not exceed one year.

E

[26] The specific provision of s. 153(2) in our view would prevail over the general provision in s. 164. In the light of s. 153(2) above which clearly stipulates that for an offence of a criminal breach of trust, it shall be sufficient to specify the gross sum and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, F we find that the first issue is devoid of any merit. We therefore hold that the first charge against the appellants was properly framed and was valid.

[27] In respect of the contention that the charge of 'diamanahkan dengan penguasaan terhadap harta tertentu' was unknown in law, learned counsel highlighted that there was no provision for such offence of "entrusted with G the dominion over the property" as s. 409 provides for "... entrusted with property or with any dominion over the property.". Learned counsel submitted that the charge was confusing and had caused prejudice to the appellants in defending themselves. Citing the Indian case of *Abinash Chandra Sarkar & Ors v. Emperor* [1936] 37 Cr LJ 439, learned counsel contended that H the defect in the charge could not be cured as it violates s. 163 of the CPC.

[28] Section 163 of the CPC as quoted above, stipulates that for every distinct offence, there shall be a separate charge. In the instant appeal, there were no distinct offences but only the offence of criminal breach of trust. In I our view, there was no violation of s. 163 of the CPC as such, except that if at all there was an error, it was for combining the two particulars of the offence in the charge, when the particulars ought to have been either 'entrusted with the property' or having 'dominion over the property'.

[29] We find the answer to this error in s. 156 of the CPC which reads: A

> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

[30] Based on the above provision, what is of significance is not the error *per se* in the charge but whether the error had resulted in the appellants being misled. We are not convinced that the appellants had in fact been misled or prejudiced by the error in the particulars of the charge such that they were not able to put up a proper defence. B C

[31] We wish to add that this court had considered similar issue in *Ahmad Zubair Hj Murshid v. PP* [2014] 1 CLJ 697 where the charge of criminal breach of trust under s. 409 Penal Code was similarly worded "... telah diamanahkan dengan penguasaan ke atas dana syarikat tersebut ...". Applying ss. 156 and 422 of the CPC, it was held that the charge so framed was not fatal to the prosecution case. D

[32] On the charge for abetment, s. 107 of the Penal Code provides as follows:

> A person abets the doing of a thing who:
>
> (a) instigates any person to do that thing; E
>
> (b) engages with one or more person or persons in any conspiracy for the doing for that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and that in order to the doing of that thing; or
>
> (c) intentionally aids, by any act or illegal omissions, the doing of that thing. F

[33] While we agree that the charge against the second appellant did not state the manner of abetment, following the decision of this court in *Chin Chan Leong v. PP & Anor* [2010] 3 CLJ 281; [2010] 5 MLJ 312, we find that the charge was not defective. In *Chin Chan Leong (supra)*, this court had stated that the proposition that the prosecution is at liberty to prefer a charge of abetment generally is supported by weighty authorities (see *Datuk Hj Harun Hj Idris & Ors v. PP* [1977] 1 LNS 24; [1978] 1 MLJ 240 FC; *Pasupathy Kanagasaby v. PP* [2005] 1 CLJ 442; [2005] 1 MLJ 493 and *Loh Liang Gun & Anor v. PP* [2007] 4 CLJ 467; [2007] 5 MLJ 159). We note that none of these cases were cited in *Sanjeev Kumar (supra)*, relied upon by learned counsel for the appellants. G H

[34] Further, we do not find anything in the records of appeal which suggest that the second appellant was confused by the lack of particulars of abetment. To the contrary, we find from the records of appeal that the defence of the second appellant that the acts were done pursuant to his I

client's instructions was not in any way hindered by the absence of the manner of abetment. The second appellant did not dispute the fact that he received the cheques from the intermediaries and that he had given them to the first appellant, which resulted in the cheques being deposited into his client's account and that thereafter he withdrew the money. In dismissing the appellants' appeal, the High Court Judge found that the second appellant had conspired with the first appellant to commit the offence of criminal breach of trust. We see no reason to disagree with the High Court Judge.

Element Of Entrustment

[35] To bring home the charge of criminal breach of trust, the prosecution must prove that the first appellant was entrusted with the cheques or that the first appellant had dominion over the cheques. The gist of the offence is, that there is dishonest misappropriation or conversion to one's own use or that there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged (see *Sathiadas v. PP* [1970] 1 LNS 142; [1970] 2 MLJ 241).

[36] We note that s. 409 of the Penal Code states "whoever being in any manner entrusted".

[37] We accept that the first appellant was not entrusted directly with the cheques by the companies but it cannot be denied that through the intermediaries, the cheques ended up with the second appellant and from the second appellant, to the first appellant. In our view "in any manner entrusted" is wide enough to encompass not only the property being directly entrusted by the owner to the accused but also property entrusted by the owner to the accused indirectly, as in the instant appeal, entrusted to the first appellant by virtue of her position as an agent of the bank.

[38] We find support in the case of *Som Nath v. State of Rajashtan* [1972] AIR SC 1490 which states:

> S. 405 merely provides, whoever being in any manner entrusted with property or with any dominion over the property, as the first ingredient of the criminal breach of trust. The words 'in any manner' in the context are significant. The s. does not provide that the entrustment of property should be by someone or the amount received must be the property of the person on whose behalf it is received. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner. The expression "entrusted" in section 409 is used in a wide sense and includes all cases in which a property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the terms on which possession had been handed over ... .

[39] At this juncture it is pertinent to note that s. 81A of the Bills of Exchange Act 1949 provides: A

> (1) Where a cheque is crossed and bears across its face the words "account payee" or "a/c payee", either with or without the word "only", the cheque shall not be transferable, but shall only be valid as between the parties thereto. B

[40] The first appellant being the Head of Customer Service Centre, Bank Muamalat, USM received the cheques on trust, for her to deal with the cheques in accordance with the law and with the rules and regulations of the bank. Notwithstanding that it may be a job entrustment and that she received the cheques not directly from the companies, the fact remains that the C cheques had been entrusted to the first appellant, for her to deal with the cheques in accordance with its purpose, namely for payment to the customs.

[41] We agree with the trial judge when she stated that:

> pengamanahan berlaku apabila OKT1 menerima cek-cek tersebut D walaupun pihak pembela mempertikaikan bahawa pemilik cek tidak memberikan pengamanahan kepada OKT1, tetapi rantai keterangan menunjukkan pemilik cek telah memberi kuasa kepada pengantara untuk menyampaikan cek kepada Pengarah Kastam untuk pembayaran duti. Tetapi cek-cek ini telah diberi kepada OKT2 dan akhirnya kepada OKT1 yang telah memasukkan cek ke dalam akaun pihak ketiga. Beliau E sepatutnya mengembalikan cek-cek tersebut tetapi gagal membuat demikian. Beliau telah override cek-cek dan meluluskan pembayaran cek-cek.

[42] Even if the submission of learned counsel is to be accepted that the element of 'entrusted with the property' was not proven, we find that the first F appellant clearly had dominion over the cheques. In *Sinnathamby v. PP* [1948] 1 LNS 160; [1948-49] MLJ Supp 75 the principle on dominion is stated as follows at p. 76:

> ... applies not merely in cases where the exercise or possession of dominion over property is one of the legal incidents of the contract of G service but in every case where by virtue of the existence of contract of service the accused person is in fact in a position to exercise dominion.

[43] In the present appeal, we are satisfied from the facts that the first appellant had dominion over the cheques. Without such dominion, the first appellant would not be able to do what she had done in terms of processing H the crossed cheques which eventually led to the crediting of the cheques into the third party's account.

No Loss Suffered

[44] On this issue, learned counsel submitted that no parties had suffered I any loss and hence the element of 'dishonestly' in s. 24 of the Penal Code had not been proved.

[45] As apparent from s. 24 of the Penal Code which is reproduced below, we find that actual wrongful loss or gain is not an ingredient to be proved for the offence of criminal breach of trust:

> 24. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing "dishonestly".

[46] It is thus immaterial that no one suffered any loss as a consequence of the acts of the appellants. In this regard, Raja Azlan Shah J (as the late Royal Highness then was) had said in *Sathiadas (supra)*:

> Criminal breach of trust is not an offence which counts as one of its factors, the loss that is the consequence of the act, it is the act itself which is in law, amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation of a directions express or implied, relating to the mode in which the trust is to be discharged ... .

[47] Be that as it may, the trial judge had in fact made a finding on wrongful loss. She stated that:

> saksi-saksi turut memberi keterangan bahawa barang-barang yang perlu dibayar cukai telah diseludup masuk ke dalam lori yang memuatkan barangan yang telah dibayar cukai. Ini menyebabkan kerugian kepada pihak kerajaan kerana duti-duti tidak dibayar.

[48] Having perused the appeal records, we find that the above finding of the trial judge was correct as it was supported by the following evidence from SP24:

> S: Bagaimana barangan yang sepatutnya dibayar duti tersebut boleh dikeluarkan sedangkan di dalam kes ini duti kastam tidak dibayar. Boleh jelaskan?
>
> J: Kami mengambil inisiatif dengan membawa, menumpang barangan tersebut di dalam lori-lori ejen, saya bawa keluar barang itu melalui kerani saya dan kami akan keluarkan barang bercukai tanpa pengetahuan kastam. Kami akan keluar menumpang lori-lori yang telah dibayar duti kastam tersebut menyeludup keluar daripada kawasan kastam melalui pintu kastam.

[49] Further, by the first appellant crediting the cheques into the second appellant's client account, we find that the first appellant had misappropriated the cheques. The first appellant cannot be said to have acted in good faith. She had without doubt, caused wrongful gain to the second appellant. There was clear evidence that the second appellant would take 10-15% of the value of the cheques before giving the balance to the intermediaries (see for example, the evidence of SP39). From the facts we find that this is not a case of negligence or carelessness but a clear case of dishonest misappropriation and conversion of the cheques.

AMLATFA

[50] Moving on to the second charges under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA), s. 4(1) provides that any person who engages in or attempts to engage in money laundering commits an offence. Money laundering as defined in s. 3(1) of AMLATFA is the act of a person who engages directly or indirectly, in a transaction that involves proceeds of an unlawful activity. Unlawful activity is any activity which is related, directly or indirectly to any serious offence or any foreign serious offence. Under the Second Schedule of AMLATFA, the offence under s. 409 of the Penal Code has been listed as a serious offence.

[51] For completeness, we acknowledge that pursuant to s. 4(2) of AMLATFA, the conviction for an offence under s. 4(1) can be sustained even without the conviction for a predicate offence. In this appeal, the predicate offence of criminal breach of trust under s. 409 of the Penal Code has been proved.

[52] On the totality of the evidence, we are unanimous in our view that the convictions of the first and the second appellants for the first charge are safe. It follows that the offence for the second charge under AMLATFA is also safe. We therefore dismiss the appeal against convictions and we affirm the convictions of the appellants.

Appeal On Sentences

[53] On sentence, the punishment for the first charge as provided under s. 409 of the Penal Code is an imprisonment term of not less than two years and not more than 20 years while for the second charge under s. 4(1) of AMLATFA, the maximum sentence of imprisonment is five years.

[54] The learned Sessions Judge had sentenced each of the appellant to ten years and five years imprisonment for the first charge and the second charge respectively, the sentences to run concurrently. The following were the reasons given by the Sessions Judge for the said sentences:

> ... Mahkamah berpendapat kesalahan yang dilakukan adalah serius. Kedua-dua OKT adalah terpelajar dan professional. Kerajaan turut rugi atas penyalahgunaan pembayaran wang duti yang hasilnya tidak diterima olehnya. Mahkamah berpendapat satu hukuman yang berat perlu dijatuhkan terhadap OKT 1 & 2.

[55] Learned counsel submitted that the sentences, which were affirmed by the High Court, were manifestly excessive. Learned counsel highlighted the fact that throughout the investigation, the appellants had co-operated with the enforcement agencies and that public interest is best served by giving the appellants the second chance to turn over a new leaf. Learned DPP on the other hand urged that the sentences be maintained on the ground of public interest and that the amount involved was huge.

[56] It is trite that an appellate court will not interfere with the sentence imposed by the trial judge unless the trial judge had wrongly applied the principles of sentencing or had embarked on an unauthorised or extraneous or irrelevant exercise of discretion. It is also a firmly established practice that an appellate court will not alter a sentence merely because it might have passed a different sentence (see *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256; *Bhandulananda Jayathilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83).

[57] In the instant appeal, while we accept that the subject matter of the first charge involved a huge amount of over RM1.5 million, the amount is not the sole determining factor for sentencing. It is a principle of sentencing that the mitigating factors must not be disregarded by the trial court (*Mohd Khir Toyo v. PP* [2015] 8 CLJ 769) and that both the interests of the appellants and the public must be considered (see *Loo Choon Fatt (supra)*. We however find that the learned Sessions Judge did not at all consider the mitigating factors before passing the sentence. This is apparent from the grounds of judgment where nothing was mentioned about the mitigation of the appellants.

[58] The reasons why the appellants deserved the maximum sentence for the second charge is also conspicuously absent in the grounds of judgment of the learned Sessions Judge. In our judgment, the maximum sentence should be reserved and is only warranted in a 'worst case imaginable' scenario (see *Sim Gek Yong v. PP* [1995] SGHC 27; *Che Hasan Senawi v. PP* [2008] 5 CLJ 769; [2009] 1 MLJ 55). There is nothing on record to show why or how this case could be categorised as the 'worst case imaginable' scenario.

[59] On the basis that the learned Sessions Judge had completely disregarded the mitigation of the appellants and had not given any justification for the imposition of the maximum sentence, we opined that this is a suitable case for appellate intervention on sentence. We therefore unanimously allow the appeal on sentence. We set aside the sentence imposed by the Sessions Judge and we substitute with a sentence of five years and three years for the first charge and the second charge respectively on each appellant, the sentences to run concurrently.